

## BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

J. Edgar Broyhill II<sup>1</sup>  
 Broyhill for Congress and Tim Nerhood,  
 in his official capacity as treasurer

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**SENSITIVE**

## GENERAL COUNSEL'S REPORT # 2

**I. ACTIONS RECOMMENDED**

Find probable cause to believe that: (1) J. Edgar Broyhill II violated 2 U.S.C. §§ 441a-1(b)(1)(C), 441a-1(b)(1)(D) and 441a-1(b)(1)(E) by failing to timely and accurately file multiple notifications of expenditures of personal funds; (2) Broyhill for Congress and Tim Nerhood, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a-1(b)(1)(C), 441a-1(b)(1)(D), 441a-1(b)(1)(E) and 11 C.F.R. §§ 400.21(b) and 400.22(b), by failing to timely and accurately file multiple notifications of expenditures of personal funds; and (3)

**II. BACKGROUND**

J. Edgar Broyhill II was a candidate for North Carolina's Fifth District seat in the United States House of Representatives in 2004. Broyhill for Congress was the authorized committee for his campaign.

On February 8, 2005, the Federal Election Commission ("Commission") found reason to believe that Mr. Broyhill and Broyhill for Congress and Laney Orr, Jr.,<sup>2</sup> in his official capacity as

<sup>1</sup> The Reports Analysis Division ("RAD") originally identified the candidate as J. Edgar Broyhill III, the name included in the Commission's reason to believe finding. In his response to the General Counsel's Brief, counsel for Mr. Broyhill clarified Mr. Broyhill's identity as J. Edgar Broyhill II. See Response of J. Edgar Broyhill II, n.1.

<sup>2</sup> Tim Nerhood replaced Mr. Orr as treasurer on March 31, 2005.

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1 treasurer, violated several reporting requirements arising under the "Millionaire's Amendment"  
2 of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"). Specifically, the  
3 Commission found reason to believe that Mr. Broyhill and Broyhill for Congress and Laney Orr,  
4 Jr., in his official capacity as treasurer, violated: 1) 2 U.S.C. § 441a-1(b)(1)(C) by failing to file  
5 the initial notification of expenditures of \$350,000 in personal funds; 2) 2 U.S.C. § 441a-  
6 1(b)(1)(D) by failing to file and failing to timely file multiple notifications of expenditures of  
7 additional personal funds; and 3) 2 U.S.C. § 441a-1(b)(1)(E) by failing to accurately report the  
8 total amount of personal funds Mr. Broyhill expended on the notifications of expenditures. The  
9 Commission also found reason to believe that Broyhill for Congress and Laney Orr, Jr., in his  
10 official capacity as treasurer, violated 11 C.F.R. § 400.21(b) and 11 C.F.R. § 400.22(b) in  
11 connection with the above mentioned failure to file and failures to timely file notifications of  
12 expenditures of personal funds.

this

Office served Respondents with General Counsel's Briefs ("GC Briefs") on September 20, 2005, which are incorporated herein by reference. After receiving extensions, Mr. Broyhill and Broyhill for Congress and Mr. Nerhood, in his official capacity as treasurer, submitted responses to the GC Briefs. Mr. Broyhill's response argues that the Act does not impose personal liability on candidates and that even if it did, Mr. Broyhill should not be found liable because he made efforts to comply with BCRA's reporting requirements. *See* Attachment 1. The response of Broyhill for Congress and Mr. Nerhood, in his official capacity as treasurer (collectively "the Committee"), admits that they failed to timely file three notifications of personal expenditures, but claims that the remaining notifications were filed on time. *See* Attachment 2. In addition, the Committee seeks leniency given its efforts to comply with the "Millionaire's Amendment" reporting requirements. *See id.*

Despite their contentions, the factual record, the GC Briefs, and the argument below show that the Respondents failed to comply with various reporting requirements arising under the "Millionaire's Amendment," resulting in liability for both the candidate and his authorized committee. *See* GC Briefs, pp. 1-4. Accordingly, this Office recommends that the Commission find probable cause to believe that Mr. Broyhill, Broyhill for Congress and Tim Nerhood, in his official capacity as treasurer, violated: 1) 2 U.S.C. § 441a-1(b)(1)(C) by failing to file the initial notification of expenditures of \$350,000 in personal funds; 2) 2 U.S.C. § 441a-1(b)(1)(D) by

1 failing to file and failing to timely file multiple notifications of expenditures of additional  
2 personal funds; and 3) 2 U.S.C. § 441a-1(b)(1)(E) by failing to accurately report the total amount  
3 of personal funds Mr. Broyhill expended on the notifications of expenditures. This Office also  
4 recommends that the Commission find probable cause to believe that the Committee and Mr.  
5 Nerhood, in his official capacity as treasurer, violated 11 C.F.R. § 400.21(b) and 11 C.F.R. §  
6 400.22(b) in connection with the above mentioned failure to file and failures to timely file  
7 notifications of expenditures of personal funds.

### 8 **III. FACTUAL SUMMARY**

9 J. Edgar Broyhill II declared his candidacy on July 22, 2003 by filing an FEC Form 2,  
10 Statement of Candidacy. As part of the Form 2, Mr. Broyhill declared his intention not to spend  
11 personal funds in excess of \$350,000 in the primary or general elections.<sup>3</sup>

12 Mr. Broyhill started to spend personal funds on his campaign on July 1, 2003.<sup>4</sup> Between  
13 July 1, 2003 and December 26, 2003, Mr. Broyhill expended \$326,500 in personal funds on his  
14 campaign.<sup>5</sup> On March 1, 2004, Broyhill made a \$50,000 loan to the Committee, increasing his  
15 total personal expenditures to \$376,500. By expending over \$350,000, the Committee and  
16 candidate were obligated to file with the Commission and with Mr. Broyhill's opponents an FEC  
17 Form 10, Notification of Expenditures from Personal Funds, within 24 hours of the threshold  
18 expenditure, or by March 2, 2004. *See* 2 U.S.C. § 441a-1(b)(1)(C). The Committee did not file a

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<sup>3</sup> Expenditures from personal funds exceeding \$350,000 require House candidates to comply with special filing and notification requirements and may entitle the candidate's opponents to higher contribution and coordinated expenditure limits. *See* 2 U.S.C. § 441a-1(a)(1) and 2 U.S.C. § 441a-1(b)(1)(C).

<sup>4</sup> An expenditure from personal funds includes direct contributions, an expenditure made by a candidate using personal funds, loans made by a candidate using personal funds, or a loan secured using such funds to the candidate's authorized committee. 2 U.S.C. § 441a-1(b)(1)(A).

<sup>5</sup> Mr. Broyhill made contributions to the Committee of \$1,000 on July 1, 2003 and \$500 on July 31, 2003. He made loans of \$200,000 and \$125,000 on September 30, 2003, and December 26, 2003, respectively.

1 Form 10 with the Commission until March 12, 2004. Furthermore, the form filed by the  
2 Committee listed the total amount of expenditures from personal funds as \$375,000. This figure  
3 omitted \$1,500 in contributions made by Mr. Broyhill in July 2003. *See supra* n.3.

4 In addition, the Committee untimely filed four additional FEC Form 10s regarding  
5 additional loans in excess of \$10,000 made by Broyhill to the Committee on March 12, 2004,  
6 April 30, 2004, June 8, 2004, and June 19, 2004, in the amounts of \$25,000, \$150,000, \$50,000,  
7 and \$50,000, respectively. Each of these FEC Form 10s, which were filed between four and  
8 thirty days late, as well as nine FEC Form 10s that were filed on time, also failed to take into  
9 account Broyhill's \$1,500 in contributions from the total amount of personal funds expenditures.  
10 Further, the Committee completely failed to file a Form 10 for a loan made on June 28, 2004, in  
11 the amount of \$90,000.

12 Respondents do not dispute that they failed to timely file an initial Form 10 when Mr.  
13 Broyhill's personal expenditures exceeded \$350,000 on March 1, 2004. Nor do they dispute that  
14 the Form 10s associated with loans made by Mr. Broyhill to Broyhill for Congress on June 19,  
15 2004 or June 28, 2004, were not timely filed with the Commission or that each Form 10 filed  
16 with the Commission omitted \$1,500 in contributions made by Mr. Broyhill in July 2003. As  
17 discussed below, Respondents do, however, dispute that they failed to timely file Form 10s  
18 related to loans made by Mr. Broyhill on March 12, 2004, April 30, 2004, and June 8, 2004.

19 **IV. LEGAL ANALYSIS**

20 **A. Mr. Broyhill And The Committee Failed To Timely File Six FEC Form 10s**

21 When a candidate to the U.S. House of Representatives makes aggregate expenditures  
22 from personal funds of \$350,000 or more, the candidate shall file a notification of the  
23 expenditure (FEC Form 10) within twenty-four hours of exceeding the threshold. 2 U.S.C.

1 § 441a-1(b)(1)(C). For any additional expenditure of \$10,000 or more, the candidate is required  
2 to file an additional notification within twenty-four hours. 2 U.S.C. § 441a-1(b)(1)(D).  
3 Commission regulations state that while a candidate's principal campaign committee must file  
4 the Form 10s, candidates must ensure that their principal campaign committees file all required  
5 reports. *See* 11 C.F.R. §§ 400.21(b), 400.22(b) and 400.25.

6 Respondents admit to filing three FEC Form 10s late. They claim, however, that three  
7 additional reports regarding loans made by Mr. Broyhill to his campaign committee were sent to  
8 the Commission on time. The regulatory language, however, clearly states that these  
9 notifications must be received within twenty-four hours by the Commission, each candidate in  
10 the same election, and the national party of each such candidate. *See* 11 C.F.R. §§ 400.21(b) and  
11 400.22(b). Furthermore, the Commission's regulations state that a document is timely filed *upon*  
12 *delivery* to the Commission. *See* 11 C.F.R. § 100.19(a)(emphasis added).

13 Respondents submitted three documents in  
14 support of its claim that the three Form 10s at issue were filed in a timely manner. One of the  
15 documents appears to be a facsimile transmission page showing that a facsimile was sent to the  
16 Commission on March 12, 2004, at 9:59 p.m. *See id.*, at (Ex. A). Although the transmission  
17 page does not reflect the contents of the facsimile, Respondents claim that this facsimile was the  
18 Form 10 associated with the \$25,000 loan Mr. Broyhill made to Broyhill for Congress on that  
19 date. In addition, the Committee claims it also sent a facsimile to the Committee at 6:05 p.m. on  
20 March 12, 2004, consisting of the initial Form 10 that the Committee admits was filed ten days

late. Respondents argue that it is the FEC's responsibility to determine why it does not have any record of these filings.<sup>6</sup> *See* Response of Broyhill for Congress, at 6.

The Commission has safeguards in place to ensure the accuracy of its records. According to the Information Division, two facsimile machines are assigned to the number to which the Committee sent its Form 10 to ensure that the sender will not get a busy signal. In addition, each facsimile machine prints out a log of received facsimiles after a predetermined number of transmissions. According to the facsimile logs from the Information Division for the period covering March 12, 2004 (*see* Attachment 4), the Commission only received one facsimile from the Committee on March 12, 2004. This facsimile, which was received at 6:05 p.m., consisted of the initial Form 10 that the Committee admits was filed ten days late. Commission records indicate that it received the Form 10 associated with the March 12, 2004, loan, not at 9:59 p.m. on March 12, 2004, but on March 25, 2004, or twelve days late.

With respect to the Form 10s regarding loans made by Mr. Broyhill to Broyhill for Congress on April 30, 2004, and June 8, 2004, Respondents submitted documents purporting to be electronic mail confirmations demonstrating that the Committee successfully sent both Form 10s to the Commission in a timely matter. *See* Response of Broyhill for Congress, at Exs. B, C. However, when this Office attempted to confirm this statement, we could not find any supporting evidence. The Information Division, in a manner similar to the safeguards established to ensure that facsimile transmissions are properly received, automatically records each electronic mail message received by the Commission at the address used by committees to file forms and reports.

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<sup>6</sup> In reality, the entity filing reports with the Commission is responsible for ensuring proper delivery. In MUR 5226 (North Carolina Republican Executive Committee), the committee timely sent the Commission its October 2000 quarterly report via Federal Express. Federal Express confirmed delivery, but later determined it delivered the package to the wrong address, resulting in an eight day delay. The Commission nevertheless authorized a civil penalty

1 That log does not include any transmissions from the Committee on the dates listed in the  
2 electronic mail confirmations provided by Respondents. *See* Attachment 5. It does, however,  
3 include entries indicating that the Commission received electronic mail messages from  
4 Respondents on May 31, 2004, and June 11, 2004, which are the dates that Commission records  
5 indicate Respondents filed the Form 10s associated with the loans made by Mr. Broyhill to  
6 Broyhill for Congress on April 30, 2004, and June 8, 2004.

7 **B. Mr. Broyhill Is Personally Liable For The Failure To File FEC Form 10s**

8 The Act and Commission regulations impose candidate liability for violations of the  
9 "Millionaire's Amendment." The reporting provisions of the "Millionaire's Amendment" state  
10 that "the candidate shall file" the required notifications of personal expenditures. *See* 2 U.S.C.  
11 §§ 441a-1(b)(1)(C) and 441a-1(b)(1)(D). In addition, the Commission's regulations state that  
12 "candidates must ensure that their principal campaign committees file all reports required under  
13 this part in a timely manner." 11 C.F.R. § 400.25. The Commission has approved and made  
14 public two conciliation agreements finding candidates liable for failing to comply with the  
15 reporting provisions of the "Millionaire's Amendment." *See* MUR 5623 (Mike Crotts for  
16 Congress) (self-financed candidate found liable for violating 2 U.S.C. § 441a-1(b)(1)(C)); MUR  
17 5488 (Brad Smith for Congress) (opponent of self-financed candidate found liable for violating 2  
18 U.S.C. § 441a(f) by improperly calculating eligibility for higher contribution limits under the  
19 "Millionaire's Amendment").

20 Mr. Broyhill argues that candidate liability is inappropriate for three reasons. First, he  
21 claims that the candidate is analogous to a committee treasurer, and should only be held  
22 personally liable in specific situations. *See* Response of J. Edgar Broyhill II, at 5-7. Second, he  
23 claims that the Act generally does not support candidate liability. *See id.*, at 8. Third, he claims



1 that because the Commission's "Millionaire's Amendment" regulations are interim final rules,  
2 they cannot form the foundation for candidate liability. *See id.*, at 9-10.

3 Mr. Broyhill's attempts to cloud the unambiguous statutory and regulatory language are  
4 unsuccessful. First, the analogy to the Commission's treasurer policy in Enforcement  
5 proceedings is inapplicable. *See* Response of J. Edgar Broyhill II, at 5-7. The Federal Election  
6 Campaign Act of 1971, as amended (the "Act"), states that political committees must file various  
7 reports with the Commission. *See, e.g.*, 2 U.S.C. § 434(a)(4). The Act specifically requires  
8 committees to appoint a treasurer as the committee representative responsible for receiving and  
9 disbursing funds and filing reports with the Commission, thus designating the treasurer as the  
10 committee representative for purposes of compliance with the Act. *See* 2 U.S.C. § 434(a)(1); *see*  
11 *also* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed.  
12 Reg. 3 (Jan. 3, 2005) ("Treasurer Policy"). This is necessary because political committees are  
13 artificial entities that can act only through their agents, such as their treasurers, and often may  
14 exist for a limited period, such as during a single election cycle. *See* Treasurer Policy.  
15 Therefore, in addition to the generally applicable provisions in the Act, such as the contribution  
16 limitations found in Section 441a(a) and the prohibition against making contributions in the  
17 name of another in Section 441f, the Commission also holds treasurers liable in their official  
18 capacity for committees' violations of the Act and assigns personal liability only under certain  
19 circumstances, such as where a treasurer knowingly and willfully violated an obligation  
20 specifically imposed by the Act or regulations. *See id.*

21 The "Millionaire's Amendment," unlike other statutes, specifically assigns responsibility  
22 for compliance with its reporting requirements to the candidate. The language from the  
23 Explanations and Justifications ("E&Js") for the "Millionaire's Amendment" regulations does

1 not insulate the candidate from liability, but in fact reinforces it. The E&J for section 400.25  
2 states that “[w]hile the Commission’s regulations implementing the new reporting provisions  
3 state that candidates’ principal campaign committees are required to file the required reports and  
4 notifications, *candidates are responsible for ensuring that their principal campaign committees*  
5 *meet these new disclosure obligations.*” 68 Fed. Reg. 3970, 3981 (Jan. 27, 2003) (emphasis  
6 added). Therefore, the E&J makes clear that candidate liability under the “Millionaire’s  
7 Amendment” is an additional layer of responsibility imposed on a self-financed candidate.

8 Mr. Broyhill also argues that he cannot be held personally liable because a candidate is  
9 “an agent of the authorized committee” and therefore cannot be found liable as a matter of  
10 agency law. *See* Response of J. Edgar Broyhill II, at 8; 2 U.S.C. § 432(e)(2). While section  
11 432(e)(2) does treat the candidate as an agent of the committee for purposes of receiving  
12 contributions or making disbursements in connection with his or her campaign, it does not  
13 preclude the candidate from being held personally liable for other actions, including the  
14 unambiguous statutory obligation to ensure compliance with the reporting requirements of the  
15 “Millionaire’s Amendment.”

16 Finally, Mr. Broyhill’s argument that he should not be held personally liable because the  
17 Commission’s “Millionaire’s Amendment” regulations are not final is not persuasive. As a  
18 threshold matter, regardless of the status of the Commission’s rules, the statutes themselves  
19 unambiguously state that the “candidate shall file” the required notifications with the  
20 Commission. 2 U.S.C. §§ 441a-1(b)(1)(C), 441a-1(b)(1)(D). Furthermore, the Commission’s  
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interim final rules,<sup>7</sup> which became effective on February 26, 2003, are fully enforceable. *See Career College Ass'n v. Riley*, 74 F.3d 1265, 1268-69 (D.C. Cir. 1996) (Department of Education "Interim Final Rule" determined to be enforceable even if it could be modified in the future).

**C. Consideration of Mitigating Factors**

the Commission considered several mitigating factors, including the fact that 2004 was the first election cycle to which the "Millionaire's Amendment" applied, the reporting violations did not appear to have had an impact on the election, and the Respondents have not appeared before the Commission previously.

Respondents argue that the Commission should also consider its efforts to comply as mitigating factors that preclude any liability for their violations of the Act. The Committee claims that after it failed to timely file the initial Form 10, it instituted a "'dual control show me' system" to ensure the timely filing of reports. *See Broyhill for Congress Response*, at 8. This system consisted of the finance director drafting the Form 10, showing it to the campaign manager prior to filing, and then showing the campaign manager "acknowledgement from the FEC" after filing. *See id.*, at Ex.2. Respondents suggest that the facsimile confirmation and two electronic mail confirmations that they submit as proof that they timely filed the Form 10s related to Mr. Broyhill's March 12, 2004, April 30, 2004 and June 8, 2004, loans to the committee were a byproduct of this system. Nevertheless, Respondents still admit they did not timely file two

<sup>7</sup> The Commission enacted the rules on an interim final basis to allow for comments from the regulated community. *See Explanations and Justifications*, 68 Fed. Reg. 3970. The Commission did not receive any comments during the comment period, which ended on March 28, 2003, and the Commission has not yet held hearings or made any amendments to the "Millionaire's Amendment" regulations.

1 Form 10s in June 2004. In addition, when RAD contacted the Committee on July 20, 2004,  
2 regarding three Form 10s that were not timely filed, the Committee never responded to the  
3 Request For Additional Information. *See* First General Counsel's Report (RR 04L-14), at 4. If  
4 Respondents were truly concerned with their efforts to comply, they should have brought the fact  
5 that they thought they filed the reports on time to RAD's attention.

6 While the efforts made by Respondents to comply with the "Millionaire's Amendment"  
7 are appreciated, the fact remains that they did not file the statutorily mandated forms in a timely  
8 fashion.

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12 **D. Conclusion**

13 In sum, the evidence establishes that Respondents failed to file or failed to timely file six  
14 FEC Form 10s. Therefore, this Office recommends that the Commission find probable cause to  
15 believe that Mr. Broyhill and Broyhill for Congress and Tim Nerhood, in his official capacity as  
16 treasurer, violated 2 U.S.C. §§ 441a-1(b)(1)(C), 441a-1(b)(1)(D), and 441a-1(b)(1)(E), and that  
17 the Committee and Tim Nerhood, in his official capacity as treasurer, violated 11 C.F.R.  
18 §§ 400.21(b) and 400.22(b).

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**VI. RECOMMENDATIONS**

1. Find probable cause to believe that J. Edgar Broyhill II violated 2 U.S.C. §§ 441a-1(b)(1)(C), 441a-1(b)(1)(D) and 441a-1(b)(1)(E).
2. Find probable cause to believe Broyhill for Congress and Tim Nerhood, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a-1(b)(1)(C), 441a-1(b)(1)(D), 441a-1(b)(1)(E) and 11 C.F.R. §§ 400.21(b) and 400.22(b).
- 3.

Lawrence H. Norton  
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**Attachments:**

1. Response to the GC Brief of J. Edgar Broyhill II
2. Response to the GC Brief of Broyhill for Congress and Tim Nerhood, in his official capacity as treasurer
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